



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2018-0550; FRL-9985-00-Region 3]

Approval and Promulgation of Air Quality Implementation Plans; West Virginia; 2018 Amendments to West Virginia's Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a state implementation plan (SIP) revision submitted by the State of West Virginia. This revision updates the effective date by which the state incorporates by reference the national ambient air quality standards (NAAQS) as well as their monitoring reference and equivalent methods. EPA is approving this revision to the West Virginia SIP in accordance with the requirements of the Clean Air Act (CAA).

DATES: This final rule is effective on **[insert date 30 days after date of publication in the Federal Register]**.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA-R03-OAR-2018-0550. All documents in the docket are listed on the <http://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are

available through <http://www.regulations.gov>, or please contact the person identified in the “For Further Information Contact” section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Joseph Schulingkamp, (215) 814-2021, or by e-mail at schulingkamp.joseph@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On July 31, 2018 (83 FR36823), EPA published a notice of proposed rulemaking (NPR) for the State of West Virginia. In the NPR, EPA proposed approval of a formal SIP revision submitted on June 8, 2018. The formal SIP revision pertains to amendments to Legislative Rule, 45CSR8 – Ambient Air Quality Standards and consists of a revised effective date of the incorporation by reference of the NAAQS and the associated monitoring reference and equivalent methods.

II. Summary of SIP Revision

This SIP revision was submitted by WVDEP in order to update the State’s incorporation by reference of the primary and secondary NAAQS and the ambient air monitoring reference and equivalent methods, found in 40 CFR Parts 50 and 53, respectively. Currently, 45CSR8 incorporates by reference 40 CFR Parts 50 and 53 as effective on June 1, 2016. Since that date, EPA retained the standard for lead and made a technical correction to the particulate standard. *See* 81 FR 71906 and 82 FR 14325, respectively. EPA also designated one new ambient air monitoring reference method for measuring concentrations of sulfur dioxide, four new ambient air monitoring equivalent methods for measuring concentrations of fine and coarse particulate matter (PM_{2.5} and PM₁₀, respectively), and two new equivalent methods for measuring concentrations of nitrogen dioxide (NO₂) in ambient air. Additional information can be found in

the NPR and will not be restated here.

III. Response to Comments

EPA received two anonymous comments on the July 31, 2018 NPR.

Comment: The first commenter asked why this SIP revision was “required” by West Virginia and how it is possible for a state to require a SIP revision. In addition, the commenter alleged that just because a state changes a date in the state’s regulation does not mean it must change in the SIP. The commenter also asked EPA to clarify the relevance of the phrase, “EPA retained the standard for lead and made a technical correction to the particulate standard,” and to explain what incorporation by reference means in the context of this rulemaking.

Response: When a state incorporates a rule or standard by reference, the state is formally adopting the standard or rule into its own state rules without having to rewrite the entirety of the referenced rule or standard. States typically incorporate rules by reference to maintain consistency between state and federal requirements and for ease of adoption by the state. While nothing in the CAA or EPA’s regulations necessitates West Virginia to incorporate by reference the NAAQS or to update the date of incorporation by reference of the NAAQS in the State’s SIP, West Virginia has chosen of its own accord to incorporate by reference the NAAQS into its SIP and recognizes that it is prudent to ensure the SIP and the state’s regulations match for consistent implementation and enforcement purposes. In the NPR, EPA inadvertently referred to the State’s voluntary decision to submit the SIP revision incorporating the NAAQS as a “requirement” when the State voluntarily decided to incorporate the NAAQS and thus chose to submit its latest revised regulation for SIP approval incorporating EPA’s latest revised NAAQS. Thus, EPA agrees with the commenter that the State is not required to submit this latest SIP

revision; West Virginia is exercising its voluntary decision to include state regulations incorporating the NAAQS. Because West Virginia chooses to incorporate by reference the NAAQS, and because West Virginia incorporates by reference the NAAQS in its state regulations by referring to federal regulations as published on a certain date, West Virginia periodically updates its state regulations to refer to the most up to date NAAQS in current federal regulations. West Virginia identified several changes in 40 CFR Parts 50 and 53 which the State determined necessitated updating the date of incorporation by reference in its own state regulations; those changes include the following: In 40 CFR Part 50, a technical correction to the particulate standard, and in 40 CFR Part 53, one new ambient air monitoring reference method for measuring concentrations of sulfur dioxide (SO₂), four new ambient air monitoring equivalent methods for measuring concentrations of PM_{2.5} and PM₁₀, respectively, and two new equivalent methods for measuring concentrations of NO₂ in ambient air.

The SIP revision submittal in this rulemaking was submitted by West Virginia because West Virginia's rule, 45CSR8 – Ambient Air Quality Standards, incorporated the NAAQS and the ambient air monitoring reference and equivalent methods found in 40 CFR Parts 50 and 53, respectively, as of June 1, 2016. Because West Virginia wanted to ensure the most recent ambient air quality standards and air monitoring methods are enforceable at the state level, West Virginia routinely revises 45CSR8 to update the date by which the rule incorporates the federal standards by reference. In this case, West Virginia revised the date of incorporation by reference from June 1, 2016 to June 1, 2018. By revising this date, West Virginia's ambient air quality standards and air monitoring methods would match the federal NAAQS and air monitoring methods in 40 CFR Parts 50 and 53.

In October 2016 and March 2017, EPA made revisions to 40 CFR Parts 50 and 53. *See* 81 FR 71906 and 82 FR 14325, respectively. In these two actions, EPA retained the NAAQS for the lead standard and made a technical correction to the particulate matter standard. After EPA made these changes, West Virginia's 45CSR8 no longer referenced the most current NAAQS and air monitoring methods; therefore, West Virginia decided to revise its state rule to reference the most recent NAAQS and air monitoring methods. In this routine update, West Virginia recognized that its newly revised 45CSR8 would no longer match the version of the same rule that was contained in its SIP, thus, a SIP revision was necessary to bring the SIP into conformance with both the state rule and the federal standards in 40 CFR Parts 50 and 53. In conclusion, West Virginia's decision to incorporate the most current NAAQS was voluntary and EPA in the proposed rule inadvertently referred to West Virginia's decision to make this SIP submission as "required." West Virginia decided voluntarily to incorporate the federal NAAQS and reference methods into its SIP and to submit this revision to incorporate the most recent version of 40 CFR Parts 50 and 53 in its SIP. Therefore, EPA agrees with the commenter that EPA inadvertently referred to the submittal as "required;" however, West Virginia's SIP meets requirements in CAA section 110 as discussed in the NPR and commenter has provided no information to challenge the basis for EPA's approval under CAA section 110.

Regarding the commenter's concern about EPA's statement that "EPA retained the standard for lead and made a technical correction to the particulate standard," EPA explained the basis for this in the NPR. No changes were made to the NAAQS for lead and thus no evaluation was needed for West Virginia's altered 45CSR8. EPA explained in the NPR that the Agency made a technical correction to our particulate matter NAAQS and the commenter offered no substantive questions or commentary regarding that change; thus, EPA provides no further substantive reply.

Regarding an explanation of “what incorporation by reference means,” EPA offers that incorporation by reference means that by this final action approving the SIP revision, EPA is including in the new version of 45CSR8 (which in turn incorporated the text of 40 CFR Parts 50 and 53) in the federally approved and federally enforceable West Virginia SIP.

Comment: The second commenter asked why the State of West Virginia has to update their ambient air quality standards if the federal standards cover all states, including West Virginia. The commenter further opined that this rulemaking action is redundant and unnecessary, and thus, EPA should not approve West Virginia’s submission.

Response: EPA disagrees with the commenter that EPA should disapprove West Virginia’s submission based on the SIP revision being “redundant and unnecessary.” Section 110 of the CAA permits states to submit regulations the states deem relevant for SIP inclusion and requires EPA to approve those submissions so long as they conform with the Act. Apart from mandatory CAA requirements, states are free to submit SIP revisions which they believe are necessary for inclusion into the state’s SIP. Regarding the comment as to “why the State must update their ambient air quality standards,” EPA’s reply is that West Virginia is not “required” to submit this revision, as explained above. West Virginia on its own accord sought to include 45CSR8 in its SIP. EPA’s decision to approve this SIP revision submittal is based on our application of section 110 of the CAA to the submittal. As the submission met the requirements of section 110 for SIP approval, EPA must approve this voluntary submission for the West Virginia SIP.

IV. Final Action

EPA is approving the West Virginia SIP revision updating the date of incorporation by reference as a revision to the West Virginia SIP. The SIP revision was submitted on June 8, 2018.

V. Incorporation by Reference

In this document, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference 45CSR8, as effective on June 1, 2018. EPA has made, and will continue to make, these materials generally available through www.regulations.gov and at the EPA Region III Office (please contact the person identified in the “For Further Information Contact” section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA’s approval, and will be incorporated by reference in the next update to the SIP compilation.¹

VI. Statutory and Executive Order Reviews

A. General Requirements

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA’s role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR

¹ 62 FR 27968 (May 22, 1997).

3821, January 21, 2011);

- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866.
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[insert date 60 days after date of publication in the Federal Register]**. Filing a petition for reconsideration by the

Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action, updating the effective date of West Virginia's 45CSR8, may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Nitrogen dioxide, Ozone, Particulate matter, Sulfur oxides.

Dated: September 24, 2018.

Cosmo Servidio,
Regional Administrator,
Region III.

40 CFR Part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 et seq.

Subpart XX--West Virginia

2. In §52.2520, the table in paragraph (c) is amended by revising the entries “Section 45-8-1”, “Section 45-8-2”, “Section 45-8-3”, and “Section 45-8-4” to read as follows:

§52.2520 Identification of plan.

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(c) ***

EPA-APPROVED REGULATIONS IN THE WEST VIRGINIA SIP

State citation [Chapter 16-20 or 45 CSR]	Title/subject	State effective date	EPA approval date	Additional explanation/ citation at 40 CFR 52.2565
* * * * *				
[45 CSR] Series 8 Ambient Air Quality Standards				
Section 45-8-1	General	6/1/18	[insert date of publication in the Federal Register], [insert Federal Register citation]	Docket #2018-0550. Filing and effective dates are revised.
Section 45-8-2	Definitions	6/1/18	[insert date of publication in the Federal Register], [insert Federal Register citation]	Docket #2018-0550. Previous Approval 3/23/18
Section 45-8-3	Adoption of Standards	6/1/18	[insert date of publication in the Federal Register],	Docket #2018-0550. Effective date is revised.

State citation [Chapter 16-20 or 45 CSR]	Title/subject	State effective date	EPA approval date	Additional explanation/ citation at 40 CFR 52.2565
			[insert Federal Register citation]	
Section 45-8-4	Inconsistency Between Rules	6/1/18	[insert date of publication in the Federal Register], [insert Federal Register citation]	Docket #2018-0550. Previous Approval 3/23/18
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[FR Doc. 2018-21664 Filed: 10/4/2018 8:45 am; Publication Date: 10/5/2018]